

FEB 5 1979

MICHAEL BODAK JR. CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-1680

THE STATE OF MICHIGAN,
Petitioner,

v.

Gary DeFillippo
Respondent.

REPLY BRIEF FOR THE PETITIONER

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OPINION BELOW

The Opinion of the Michigan Court of Appeals, Division I, (Petition for Writ of Certiorari, Appendix A, pp 12-15), is reported at 80 Mich App 197; 262 NW2d 921 (1977)).

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on December 6, 1977. The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal was entered May 1, 1978. The Petition for Writ of Certiorari was docketed on May 24, 1977, and granted on October 2, 1978. The jurisdiction of this Court is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

I.

WHETHER AN ARREST MADE IN GOOD FAITH RELIANCE ON A PRESUMPTIVELY VALID ORDINANCE IS A VALID ARREST, REGARDLESS OF THE ULTIMATE VALIDITY OF THE ORDINANCE?

II.

IS AN ORDINANCE WHICH PROVIDES THAT IT IS UNLAWFUL FOR ONE VALIDLY STOPPED PURSUANT TO TERRY V OHIO, 392 US 1; 88 S Ct 1868; 20 LEd 2d 889 (1968) TO REFUSE TO IDENTIFY HIMSELF AND/OR REFUSE TO PROVIDE VERIFIABLE PROOF OF HIS IDENTITY CONSTITUTIONAL?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United State Constitution provides in pertinent part:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Two Detroit Police Officers received a radio call to investigate two allegedly drunken persons in an alley. (R, 3) Upon arrival at the alley the officers found respondent and a female who had her pants down. (R, 3) She was intoxicated; respondent did not appear to be so. When asked for identification respondent replied that he was Sergeant Mash, a Detroit Police Officer. When asked his badge number he then stated that he worked for a Sergeant Mash. (R, 4) He was arrested for failure to produce identification, handcuffed, and searched, the search producing marijuana. (R, 4-5, 9) At the station phencyclidine was found in a pack of defendant's cigarettes. (R, 6-7)

Respondent was charged with possession of phencyclidine. MCLA 335.341(4)(b); MSA 18.1070 (41)(4)-(b). A motion to suppress evidence was denied, and on interlocutory appeal the Michigan Court of Appeals held the ordinance under which respondent was initially arrested unconstitutional (Detroit City Code 39-1-52.3). The court also rejected petitioner's argument that the officer's good faith reliance on the ordinance which had not been declared unconstitutional at the time of the arrest rendered the arrest lawful. On May 1, 1978, the Michigan Supreme Court denied petitioner's application for leave to appeal.

ARGUMENT

I.

AN ARREST MADE IN GOOD FAITH RELIANCE ON A PRESUMPTIVELY VALID PENAL ORDINANCE IS A VALID ARREST, REGARDLESS OF THE ULTIMATE VALIDITY OF THE ORDINANCE.

Respondent has alleged that the Detroit Common Council lacked good faith in enacting 39-1-52.3. Petitioner adheres to his argument that the exclusionary rule is not directed towards legislators. Further, respondent's claim that the council should have known that MCLA 10.31 and Walsh v City of River Rouge, 385 Mich 623; 189 NW 2d 318 (1971) prohibited the emergency enactment of 39-1-52.3 is without merit. In People v Arnold Cortez Smith, Mich App ____; ____ NW 2d ____ (No. 77-3096, 1-3-79); dealing with the emergency enactment of another Detroit ordinance, a juvenile curfew ordinance, the court said:

Section 4-116 does not provide for the declaration of a state of emergency with all the attendant consequences as envisioned by MCLA 10.31; MSA 3.4 (1) and Walsh. Rather, it merely provides that an ordinance may be given immediate effect where an emergency situation requires it. . . The provision of the Detroit City Charter which allows such an ordinance to be given immediate effect does not rise to the level of a declaration of a state of emergency as provided for in MCLA 10.31; MSA 3.4(1). We therefore conclude that no preemption problem exists in the instant case.

Respondent has also alleged adequate and independent state grounds for decision, because state grounds were raised but not passed upon by the state court. Of course, this argument leads only to a remand to the Michigan Court of Appeals for further proceedings should Petitioner prevail in this Court. The fact remains that the case was decided below solely on a federal ground. Moreover, the Smith case has decided Respondent's state ground adversely to him.

II.

AN ORDINANCE WHICH PROVIDES THAT IT IS UNLAWFUL FOR ONE VALIDLY STOPPED PURSUANT TO TERRY V OHIO, 392 US 1; 88 S Ct 1868; 20 LEd 2d 889 (1968) TO REFUSE TO IDENTIFY HIMSELF, AND/OR TO REFUSE TO PROVIDE VERIFIABLE PROOF OF HIS IDENTITY, IS NOT UNCONSTITUTIONAL.

Petitioner adheres to his position in his brief heretofore filed.

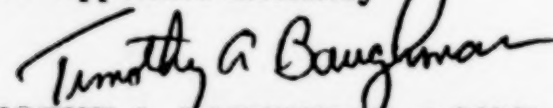
CONCLUSION

WHEREFORE, Petitioner concludes that the Court should reverse the Michigan Court of Appeals, hold that the seizure of the phencyclidene was accomplished without violation of any constitutional right of respondent, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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